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BY FEDERAL EXPRESS

March 18, 2016

Edan Rotenberg
Nicholas W. Tapert
Super Law Group, LLC
411 State Street, Suite 2R
Brooklyn, New York 11217

RECEIVED
2016 MAR 23 AM 10:54
OFFICE OF THE
EXECUTIVE SECRETARIAT

Re: Con-Strux, LLC
Notice of Violation and Intent to File Suit under the Clean Water Act

Dear Mr. Rotenberg and Mr. Tapert:

We have been retained by Con-Strux, LLC in connection with the Notice of Violation and Intent to File Suit letter dated January 21, 2016 ("Notice of Violation"). By that letter you notify Con-Strux of Sierra Club LI Group's ("Sierra Club") intent to file suit against Con-Strux, LLC and Marc Bretz (collectively, "Con-Strux") pursuant to Section 505(a) of the Federal Clean Water Act ("CWA") for violations of the CWA. Please be advised that Sierra Club has no basis for the commencement of a lawsuit against Con-Strux for any discharge of alleged polluted stormwater without a permit under the CWA or any other federal law, state law or regulation.

Underlying Sierra Club's Notice of Violation is its mistaken belief that Con-Strux, a registered construction and demolition recycling facility, is obligated to obtain a National Pollutant Discharge Elimination System ("NPDES") permit issued by the EPA or a Multi-Sector General Permit ("General Permit") issued by the New York State Department of Environmental Conservation ("DEC") for the discharge of stormwater associated with "industrial activity". Sierra Club's belief is simply wrong on the facts and the law. Con-Strux's construction and demolition recycling operation is not classified as an "industrial activity" as that term is defined in 40 CFR 122.26(b)(14)(i-ix) and (xi), and since Con-Strux is not engaged in an "industrial activity" it is not obligated to obtain a NPDES permit or a General Permit.

While the CWA requires stormwater discharge permits for discharges associated with "industrial activity", the Sierra Club mistakenly ascribes Sector N industrial activity to Con-Strux. Sector N industrial activity is limited to "facilities involved in recycling of materials, including *metal scrapyards, battery reclaims, salvage yards, and automobile junkyards*". (*emphasis added*)

Moreover, DEC has also authorized Con-Strux to operate as a registered construction and demolition recycling facility because its recycling operation is limited to RUCARBS. The DEC defines RUCARBS as

...recognizable *uncontaminated* concrete and other masonry waste (including steel or fiberglass reinforcing embedded in concrete), asphalt pavement, brick, soil or rock that has not been in contact with a spill from a petroleum product, hazardous waste, or industrial waste, and that is not commingled with any other solid waste. 6 NYCRR 360-16.1(d)(1)(i). (*emphasis added*)

Con-Strux's recycling operation accepts concrete and asphalt material from old roads, building foundations and other antiquated construction aggregates consisting of concrete, asphalt, brick and dirt. The materials are crushed into smaller aggregates and resold for construction uses, such as Recycled Concrete Aggregate (RCA). This beneficial reuse diverts unusable construction material that was destined for landfills, into viable building materials. Con-Strux is registered by the DEC as "beneficial use facility" pursuant to 6 NYCRR 360-1.15 (b)(11). The construction and demolition materials recycled by Con-Strux are clearly not included nor contemplated by Sector N industrial activity.¹ See, 40 CFR 122.26 (b)(14)(vi). A copy of the DEC web page confirming Con-Strux's status as a RUCARB recycling facility is attached for convenience.

A RUCARB facility is expressly exempt from regulation under Part 360 as a solid waste management facility requiring a permit. Instead, Con-Strux is subject to the registration provisions of 6 NYCRR 360-1.8(h).

As you are aware, Section 402 of the Clean Water Act ("CWA") is implemented and administered in New York in accordance with the Environmental Conservation Law ("ECL") by the DEC through its New York's State Pollutant Discharge Elimination System (SPDES) program. Similarly, facilities engaged in "industrial activity" defined in 40 CFR 122.26(b)(14)(i-ix) and (xi) must obtain permit coverage for stormwater discharges to waters of the United States through either an individual industrial SPDES permit or the SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity. And, if applicable, this permit requires facilities to develop Stormwater Pollution Prevention Plans (SWPPPs) and report the results of industry-specific monitoring to DEC on an annual basis.

By its determination that Con-Strux was not a construction and demolition recycling facility requiring a Part 360 permit, only registration, and the fact that the Con-Strux facility does not

¹The EPA Office of Water issued fact sheet on Sector N specifically discusses stormwater discharges for scrap recycling and waste recycling facilities as:

Scrap and waste recycling facilities (non-source separated, non-liquid recyclable materials) engaged in processing, reclaiming, and wholesale distribution of scrap and waste materials such as ferrous and nonferrous metals, paper, plastic, cardboard, glass, and animal hides.

Waste recycling facilities (liquid recyclable materials) engaged in reclaiming and recycling liquid wastes such as used oil, antifreeze, mineral spirits, and industrial solvents.

Recycling facilities that only receive source-separated recyclable materials primarily from non-industrial and residential sources (i.e., common consumer products including paper, newspaper, glass, cardboard, plastic containers, aluminum and tin cans); including recycling facilities commonly referred to as material recovery facilities (MRF).

handle the materials referenced under Sector N, it specifically exempted Con-Strux from a stormwater discharge General Permit and the associated SWPPP.² This determination was recently verbally confirmed by the DEC. Specifically, Con-Strux contacted the DEC to confirm that as a registered RUCARB recycling facility it was not obligated to obtain a General Permit. As a result of that inquiry, and presumably review of the Notice of Violation (forwarded from the Central Office), DEC conducted an unannounced facility inspection on February 18, 2016. Based on this inspection the DEC expressed no reason for concern for the operation and did not identify to Con-Strux any violations. All of which confirms that neither a General Permit nor a SWPPP is being required by the DEC.

Based on the foregoing, Con-Strux requests Sierra Club confirm in writing the withdrawal of its Notice of Violation.

Sincerely,



Denise J. D'Ambrosio

Enclosures

cc: By Regular Mail

Gina McCarthy, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Judith Enck, EPA Region 2 Administrator
Environmental Protection Agency
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New York, NY 10007-1866

Basil Seggos, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1011

² As a condition to build the Con-Strux facility, the Town of Babylon required that Con-Strux apply for a SPDES General Permit for Stormwater Discharges from Construction Activities and also required that they submit a SWPPP prepared by a licensed professional engineer. Once both actions were verified by the Town, the building permit was issued.

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